

1. Introduction

In the last two decades the number of migrations towards EU countries from non-EU countries grew rapidly. Not only the fact that we live in an age of globalization had its part in this, but also the growing interconnectivity of the EU countries themselves. With this growing migration trend, there come certain problems, such as illegal migration, the migration of radical or terrorist groups and more. Therefore, the EU Member States decided to create an Agency regarding these concerns.

The European Agency for the Management of Operational Cooperation at the External Borders, or better known under its acronym *Frontex*, was created on the 26th of October 2004 by the Council Regulation EC 2007/2004. Its operational start was in 2005 with the Agency seat in Warsaw. Since then, there was a lot of controversy surrounding this Agency. It was especially criticized by human rights activists and pro-migrant groups for human rights violations, which Frontex conducted.

In the last few years Frontex, as a non-majoritarian institution, experienced the most extensive upgrading in financial and human resources. Apart from this, the Agency was in contact with several lobby-groups, especially the weapon lobby. Both these facts raised some suspicion, again especially coming from human rights and pro-migrant groups.

The concern is mainly due to the fact that Frontex is not directly a delegation of authority of the Member States. The power of transgovernmental coordination and assistance in border management can be seen as a new form of authority, which is not held by the governments of the Member States but is incorporated in the Frontex-Agency. Further, the EU policymakers are failing to establish precise law-making and political steering, which leads to Frontex operating within an underspecified context. This leads to certain activities rather contradictory to the provisions of the Public International Law and EU Human Rights.

The Agency's practices are more related to risk-taking than they are to securitizing language or the classic logic of securitization, leading to it being located on a continuum, in which Frontex finds itself near an endpoint characterized by survival, existential threats and militarization.

In order to analyze the activities of Frontex within the context of the international migration crisis, and examining the accountability in case of human

rights violations, this research paper will begin by exhibiting the historical environment in which Frontex was created. Following this, it will paint the development of the Agency over the years since the creation, taking into consideration the expansion in monetary and human capital, which the Agency achieved since. Further the paper will examine why the EU Member States chose the form of an Agency.

The third chapter will be concerned with the risk analysis conducted by Frontex, which is essential for the joint operations. This will include, what risk analysis actually consists of and how it impacts the activities of Frontex. It will consider not only the impact on Frontex and the Member States, but also the impact it has on the migrants themselves, by creating a linguistic framework.

The fourth chapter will examine the accountability of Frontex within the international law system, by also taking a closer look at third party responsibility.

The fifth and last theoretical chapter is concerned with the growing securitization- and militarization-movement at the EU external borders and of Frontex, as well as the growing trend towards a humanitarian approach within the Agency. It will include again the linguistic aspects of framing individuals and situations in certain ways, and it will also concern the connection between Frontex and the weapons lobby, as well as take a look at the revised Copenhagen School Securitization Framework implemented by the Agency.

Chapter six and seven will be concerned with the joint land operation *POSEIDON* in Greece and the joint sea operation *HERA*, which was conducted in the Mediterranean Sea.

In the conclusion this paper will try to introduce some possible solutions regarding the problematics presented within the following chapters.

2. History and Establishment of Frontex

In the following sub-chapters this paper will explore the historical environment which led to the creation of Frontex, building up a basis to understand the problematics which will be shown in the later chapters.

Following on from this, this paper will examine the Frontex regulation, with its expansion in monetary and human capital, showing the scope, to which extent the Agency actually grew over the last years.

2.1 Historical Environment

The creation of Frontex was the result of a multiplicity of events which led to the migration situation in Europe being problematic enough to justify the collaborative EU Agency. It already began with the high migration rate after the Cold War. With this changing migration situation came a high media coverage, which led to increased public concern, resulting in migration being seen as a contentious issue in the 1990s (Mitsilegas et al, 2003, cited in Perkowski, 2012, p. 10).

Regarding the changing migration situation there were two developments within the EU that were of importance. The Treaty of Maastricht in 1992 marks the beginning of the cooperation on migration within this EU framework (Leonard, 2010, cited in Perkowski, 2012, p. 11). After this, in 1997 the Treaty of Amsterdam introduced the so-called *Area of Freedom, Security, and Justice* (short AFSJ). Here it is important to notice, that although the objectives of the AFSJ were created through the Treaty of Amsterdam, the policy area itself was not yet supranationalized in this period. With the AFSJ a further consolidation of communitization of migration appeared (Kostakopoulos, 2003; Pellerin, 2005, cited in Perkowski, 2012, p. 11).

With the Tampere Treaty of 1998 a much broader objective within the AFSJ was established and with these significantly new competences within the area of asylum, migration and external border controls were transferred to the EU level (Kauert, 2005, p. 473). With this the AFSJ was also thought to provide place for operational cooperation, which was later taken by the agency Frontex, as will be seen later.

Within the EU migration discourse there were three main lines of argumentation. One was the *Safeguarding Freedom Argument*, the *Safeguarding Asylum and Saving Lives Argument* and the *Weakest Link Argument*.

The *Safeguarding Freedom Argument* conceptualizes freedom as a fundamental right, and that freedom is meaningless without security and justice. This was especially a critical topic after the events of the 11th of September 2001. In this period the Member States of the EU agreed that the “borders need to be secured to safeguard the value of freedom in the EU” (Perkowski, 2012, p. 13). Freedom in this sense is subordinated to security, which leads to a reconceptualization of the term, thus showing it as a defence of *us* against the unknown *them* (Perkowski, 2012, p. 14). This is obviously problematic, since the creation of fear in the name of freedom leads to the encouragement of discriminatory attitudes and the erosion of human rights regarding migrants (this will be taken up in a later chapter of this paper again).

The *Safeguarding Asylum and Saving Lives Argument* constitutes the right to seek asylum as a fundamental right (Perkowski, 2012, p. 14). In this line of argumentation, it is foremost the public opinion which weighs the scales. The public is only open for granting asylum to migrants if illegal migration is stopped and the whole procedure happens on the correct *bureaucratic* way. With rising illegal migration, the public opinion towards migration in general and with this also towards asylum requests is increasingly negative. This constitutes a problem for the migrants since the EU foremost serves its citizens. The EU reacts by establishing border controls to help stop illegal migration and to safeguard asylum, thus saving human lives (Perkowski, 2012, p. 14). The problem here is that the conditions in migrants’ home countries are not taken into consideration, as well as the role that the EU plays with creating such conditions in the countries of origin. The things considered are foremost economic, social, and political impacts of the migration flow within the Member States (Perkowski, 2012, p. 16).

Finally, the *Weakest Link Argument* is concerned with the fact that the AFSJ security can only be as strong as the weakest link within (Perkowski, 2012, p. 16). It states that the trust in the AFSJ is only perceivable if all Member States acknowledge the borders as safe. This is only achievable if the AFSJ provides the same rules, standards, and procedures for all Member States, thus creating solidarity and trust through the establishment of a coordinated operational cooperation (Perkowski, 2012, p. 16).

2.1.1 The context of the time: Agencification

The context of the time (around the beginning of the 2000s) was also characterised by the third wave of agencification. Agencification meaning the delegation of authority to non-majoritarian institutions fulfilling public functions (Pollak and Slominski, 2009, p. 904). In this context it may seem problematic, since “[...] Frontex in particular does not represent a delegation of powers from the EU institutions or member states” (Perkowski, 2019, p. 1184). Perkowski mentions here something, which relates to Pollack and Slominski. There is a certain problematic while talking about the delegation of powers towards Frontex, since the principals themselves (here the EU institutions or Member States) do not possess the actual power of “transgovernmental coordination and assistance in the field of border management” (Pollack and Slominski, 2009, p. 905). Thus, they are actually not able to delegate such power to any Agency.

If we now take a deeper look into the agencification process, we find that Chiti this process should be understood as an evolution of the Community positive law. In this sense, the objective of the competent public authorities is not to balance public and private interests, but to ensure the abidance of private individuals to the rules imposed by the Community Legislator (Chiti, 2004, p. 413). Further it is important to note, that the agency itself pursues the public interest, which again must consist of a Community Character. To get into this deeper it is important to understand this concept. The Community Character of an Agency or Organization provides that the function is actually carried out by said Agency or Organization, instead of distributed between several smaller bodies. From a functional perspective this means, that this Agency or Organization is expressly taken to fulfil all the activities required for the performance of the Community Function in question (Chiti, 2004, p. 417). Chiti (2004, p. 417) goes on by stating that “[...] the function is distributed on several levels according to a plan that is characterised by the competition between different decision-making centres and the sharing of competences between supranational administrations and those of Member States, has to be specified, in relation to the integrated character of the administrative system.” Further we have the possibility to assign a structural and a functional aspect to the process of agencification. The structural aspect consists of redefining the responsibilities and autonomy of public organizations, while the functional aspect consists of the assignment of accountability and controlling through governments with a shift from *ex ante* to *ex post*, and more focus on results than inputs (Verhoest, 2017, p. 327). It is important to note here, that

Verhoest is referring to agencies on a national level, but it is still possible to allocate Frontex within the definition of a type 2 Agency (which we will be dealing with more specific later), since it is legally independent with its own legal personality and includes managerial autonomy. To take up the term of a legal personality which is applied to Frontex it offers itself to analyse this more in-depth. To obtain a legal personality, the Community Body needs to incorporate certain characteristics: “its competences are conferred on the basis of supranational legislation; it is separate from the Commission, but auxiliary to the latter; it is organised according to the formula of the representativeness; and from a functional perspective, it aims to create both a decentralised structure for the area in question, and guarantee a collaboration framework amongst national governments, and between the latter and the Community central administration” (Chiti, 2004, p. 420). As it will become evident through the next chapters, Frontex has these characteristics incorporated. Further it is not only based on public law, but also on international law, since it is a supranational organization (Verhoest, 2017, p. 328). Regarding the autonomy of agencies, the “political principals can control agencies by using ex ante input-oriented control through restrictions [...], ex post result-oriented control [...], structural control through the appointment and evaluation of agency managers and board members, financial control through budget allocations” (Verhoest et al, 2004, cited in Verhoest, 2017, p. 331). Looking at this we are able to make some connections to Frontex. The input-oriented control can be seen through the Risk Analysis Reports, as well as the result-oriented control through the Programme of Work Reports. Further a big part the financial control of Frontex is carried out by the European Parliament. These topics will be taken on by a later chapter of this paper.

As the following chapters and sub-chapters will show this conceptualization is somewhat applicable but at the same time partly contradictory to the Agency Frontex.

Before we go on with further reasons leading to the cooperation of Member States regarding border control, it would make sense to take a look at the *Integrated Border Management* (short IBM) and locate Frontex within the five dimensions of it. With the IBM the Council concluded in establishing a framework, which inhabits five distinct dimensions. These are as follows:

The first two consist of the border control including border checks, border surveillance, relevant risk analysis and crime intelligence, as well as detecting and investigating cross-border crimes (Leonard, 2010, p. 373). Both of the mentioned dimensions fit quite perfectly to the operational tasks of Frontex, relating to the conduction of Risk Analysis, Screening and Debriefing of the